Supreme Court, U.S.
F I L E D
JAN 7 1996
CLERK

No. 95-726

In The
Supreme Court of the United States
October Term, 1995

STATE OF CONNECTICUT,
Petitioner,
v.
MURRAY COLTON,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Murray Colton moves the Court for leave to proceed in forma pauperis pursuant to Rule 39. Respondent's supporting affidavit is attached hereto. Respondent sought to proceed in forma pauperis in the Supreme Court of Connecticut and was granted such status. Further, pursuant to Rule 15, respondent is entitled to defend in this action and has an obligation to this Court to address all perceived misstatements of fact and law that concern the Petition for Writ of Certiorari filed by the State of Connecticut.

RESPONDENT MURRAY COLTON

BY: _____

Mark R. Kravitz
Counsel of Record
Bonnie L. Patten
Wiggin & Dana
One Century Tower
New Haven, CT 06508
(203) 498-4400

Kenneth Rosenthal
Brenner, Saltzman & Wallman
271 Whitney Ave.
New Haven, CT 06511
(203) 772-2600

44 pp

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF CONNECTICUT	:	
V.	:	NO. 95-726
MURRAY COLTON	:	

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Murray Colton, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am the respondent and entitled to defend; and that I am obligated to address the perceived misstatements of fact and law that concern the Petition for Writ of Certiorari.

I further swear that the responses that I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting this case are true.

1. Are you presently employed? **Yes.**

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

      I earn approximately $1,440.00 per month working for DPL, 136 Bradley Road, Woodbridge, Connecticut.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? **No.**

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? **Yes.**

a. If the answer is yes, state the total value of the items owned.

The total value of items owned is $85.00.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? **Yes.**

a. If the answer is yes, describe the property and state its approximate value.

I own a 1982 Mercury Capri. Its approximate value is $800.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I am the full-time parent of my eleven month old son, Murray Colton, Jr.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Murray Colton SR
Murray Colton

Subscribed and sworn to, before me this 4th day of January 1996.

Commissioner of the
Connecticut Superior Court

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF CONNECTICUT	:	
V.	:	NO. 95-726
MURRAY COLTON	:	

ORDER OF COURT

The application is hereby granted. Let the applicant proceed without the prepayment of cost or fees or the necessity of giving security therefor.

No. 95-726

In The

Supreme Court of the United States

October Term, 1995

STATE OF CONNECTICUT,

Petitioner,

v.

MURRAY COLTON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Connecticut

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Mark R. Kravitz
Counsel of Record
Bonnie L. Patten
Wiggin & Dana
One Century Tower
New Haven, CT 06508
(203) 498-4400

Kenneth Rosenthal
Brenner, Saltzman & Wallman
271 Whitney Ave.
New Haven, CT 06511
(203) 772-2600

Counsel for Respondent

QUESTIONS PRESENTED

(1) Does this Court have jurisdiction to review the decision of the Connecticut Supreme Court remanding this case to the trial court for an evidentiary hearing and consideration, for the first time, of the merits of Respondent's claims?

(2) Did the Connecticut Supreme Court -- which did not rule on the merits of Respondent's double jeopardy claim -- err in remanding this case for an evidentiary hearing on Respondent's motion to dismiss on the ground that the trial court had improperly denied Respondent a hearing on the basis of a perceived procedural defect under Connecticut law?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

CONNECTICUT PRACTICE BOOK PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 7

I. THIS COURT LACKS JURISDICTION TO REVIEW THE REMAND RULING BELOW 9

II. THE CONNECTICUT SUPREME COURT'S DECISION RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS 15

III. THERE IS NO "SPLIT" AMONG THE CIRCUITS THAT REQUIRES THIS COURT'S REVIEW 22

IV. THE DECISION BELOW IS NOT AN APPROPRIATE VEHICLE FOR ADDRESSING THE CONCERNS RAISED BY THE PETITIONER 27

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES:

Arizona v. Washington, 434 U.S. 497 (1978) 12

Beringer v. Sheahan, 934 F.2d 110 (7th Cir. 1991), cert. denied, 502 U.S. 1006 (1991) 22, 23, 25

Brown v. Gerdes, 321 U.S. 178 (1944) 20

California v. Rooney, 483 U.S. 307 (1987) 11, 13, 14

Catlin v. United States, 324 U.S. 229 (1945) 12

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) 16, 21

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 12

Commonwealth v. Green, 536 A.2d 436 (Pa. Super. 1988) 24, 26

Coreas v. United States, 585 A.2d 1376 (D.C. App.), cert. denied, 502 U.S. 855 (1991) 24, 26

Cox Broadcasting v. Cohn Corp., 420 U.S. 469 (1975) 11, 12

Durley v. Mayo, 351 U.S. 277 (1956) 15

Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157 (1917) 16

Florida v. Meyers, 466 U.S. 380 (1984) 12

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 16

Fugitt v. Lemacks, 833 F.2d 251 (11th Cir. 1987) 24, 26

Gori v. United States, 367 U.S. 364 (1961) 13

Greyson v. Kellam, 937 F.2d 1409 (9th Cir. 1991) 24, 26

Hathorn v. Lovorn, 457 U.S. 255 (1982) 9

Herb v. Pitcairn, 324 U.S. 117 (1945) 16, 20

Illinois v. Somerville, 410 U.S. 458 (1973) 13

Jackson v. Fort Stanton Hospital, 964 F.2d 980 (10th Cir. 1992) 9

Jacob v. Clarke, 52 F.3d 178 (8th Cir.), cert. denied, 116 S. Ct. 323 (1995) 23, 26

Market Street R. Co. v. Railroad Commission of Cal., 324 U.S. 548 (1945) 15

Mercer v. Commissioner of Corrections, 230 Conn. 88, 644 A.2d 340 (1994) 17

Mills v. Alabama, 384 U.S. 214 (1966) 11

Minnick v. California Department of Corrections, 452 U.S. 105 (1981) 15

Monger v. Florida, 405 U.S. 958 (1972) 20

Murdock v. City of Memphis, 87 U.S. (20 Wall) 590 (1875) 19

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) 9, 12

O'Dell v. Espinoza, 456 U.S. 430 (1982) 14

Oregon v. Kennedy, 456 U.S. 667 (1982) 12, 13, 25, 27, 30

People v. Harbold, 635 N.E.2d 900 (Ill. App. 1994), cert. denied, 115 S. Ct. 1254 (1995) 24, 26

People v. Ramirez, 500 N.E.2d 14 (Ill. 1986), cert. denied, 481 U.S. 1053 (1987) 24

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 11

Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946) 11

PUBLISHER'S NOTE

THE FOLLOWING PAGE IS UNAVAILABLE
FOR FILMING Pg. V

United States ex rel. Beringer v. O'Grady, 737 F. Supp. 478 (N.D. Ill. 1990) 25

United States v. Coleman, 862 F.2d 455 (3d Cir. 1988), cert. denied, 490 U.S. 1070 (1989) 24

United States v. Curtis, 683 F.2d 769 (3rd Cir.), cert. denied, 459 U.S. 1018 (1982) 23, 24, 25

United States v. Dante, 739 F.2d 547 (11th Cir.), cert. denied, 469 U.S. 1036 (1984) 24

United States v. Dinitz, 424 U.S. 600 (1976) 12

United States v. Pavloyianis, 996 F.2d 1467 (2d Cir. 1993) 23

United States v. Rios, 637 F.2d 728 (10th Cir. 1980), cert. denied, 452 U.S. 918 (1981) 24

United States v. Singleterry, 683 F.2d 122 (5th Cir.), cert. denied, 459 U.S. 1021 (1982) 24

United States v. Wallach, 979 F.2d 912 (2d Cir. 1992), cert. denied, 113 S. Ct. 2414 (1993) 10, 22

Wilson v. Loew's, Inc., 355 U.S. 597 (1958) 16

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 20

STATUTES AND RULES:

28 U.S.C. § 1257 ..... 7, 9, 14

Conn. Practice Book § 808 16

Conn. Practice Book § 811 16

Conn. Practice Book § 812 16

Conn. Practice Book § 815 16

CONNECTICUT PRACTICE BOOK PROVISIONS INVOLVED

Connecticut Practice Book § 808:

§ 808. **Pretrial Motion Practice - Matters to Be Raised by Motion**

Any defense, objection or request capable of determination without a trial of the general issue may be raised only by a pretrial motion made in conformity with this chapter.

Connecticut Practice Book § 811:

§ 811. **Pretrial Motion Practice - Time for Making Pretrial Motions or Requests**

Unless otherwise provided by these rules or statute, all pretrial motions or requests shall be made not later than ten days after the first pretrial conference in the court where the case will be tried, or, with permission of the court, at such later time as the judicial authority may fix. However, defenses and objections alleging lack of jurisdiction over the offense charged or failure of the information to charge an offense may be raised by the defendant or noticed by the judicial authority at any time during the pendency of the proceedings.

Connecticut Practice Book § 812:

§ 812. **Pretrial Motion Practice - Form and Manner of Making Pretrial Motions**

Pretrial motions shall be written unless, for good cause shown, the judicial authority shall grant permission to make an oral pretrial motion. Every written motion shall include a statement of the factual and legal or other basis therefor, shall state whether the same or a similar motion was previously filed and ruled upon, and shall have annexed to it a proper order. All defense and objections that must be raised by motion prior to trial shall, to the extent possible, be raised at the same time.

Connecticut Practice Book § 815:

§ 815. **Motion to Dismiss - Matters to Be Raised**

The following defenses or objections, if capable of determination without a trial of the general issue, shall, if made prior to trial, be raised by a motion to dismiss the information:

(1) Defects in the institution of the prosecution including any grand jury proceedings;

(2) Defects in the information including failure to charge an offense;

(3) Statute of limitations;

(4) Absence of jurisdiction of the court over the defendant or the subject matter;

(5) Insufficiency of evidence or cause to justify the bringing or continuing of such information or the placing of the defendant on trial;

(6) Previous prosecution barring the present prosecution;

(7) Claim that the defendant has been denied a speedy trial;

(8) Claim that the law defining the offense charged is unconstitutional or otherwise invalid; or

(9) Any other grounds.

Respondent Murray Colton respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of an order of the Connecticut Supreme Court in a pending state court prosecution, remanding to the trial court for an evidentiary hearing on Respondent's pretrial motion to dismiss that has yet to be determined on the merits by any court. The opinion and order of remand are reported at 234 Conn. 683, 663 A.2d 339 (1995).

STATEMENT OF THE CASE

This case involves a pending state criminal prosecution in which there is presently no final judgment. See State v. Colton ("Colton II"), 234 Conn. 683, 700, 663 A.2d 339, 348 (1995). In the course of proceedings to date, the State of Connecticut has conducted three trials of Respondent. The jurors in each of the first two trials were unable to reach a verdict, and mistrials were declared. Defendant's conviction after the third trial was overturned by the unanimous decision of the Connecticut Supreme Court. State v. Colton ("Colton I"), 227 Conn. 231, 630 A.2d 577 (1993).

In overturning Respondent's conviction following his third trial, the Connecticut Supreme Court concluded that the trial court had violated Respondent's constitutional rights by precluding certain evidence showing motive and bias on the part of the State's "lone" witness, Janice Tourangeau. The testimony of Tourangeau was so essential to the State's case that "[t]he state conceded at trial that in order to convict the defendant of murder, the jury would have to credit the testimony of Tourangeau." Id. at 238-39, 630 A.2d at 582 (footnote omitted). Thus, in overturning the verdict, the Connecticut

Supreme Court held that "[t]he exclusion of evidence bearing on the motivation of a chief witness for the state, particularly when no other evidence corroborated material aspects of the witness' testimony [was] harmful error." Id. at 254, 630 A.2d at 590 (citations omitted).

Following that decision, and in accordance with state procedural rules, Respondent filed eight pretrial motions in connection with the State's unprecedented attempt to try him a fourth time, including a Motion to Dismiss based on a violation of Respondent's double jeopardy rights arising from prosecutorial misconduct in connection with the testimony of the State's chief witness, Tourangeau, during the third trial. Respondent alleged that the prosecutor had engaged in a deliberate pattern of misconduct surrounding and leading up to the third trial in order to concoct a false portrayal of the outcome-determinative issue of Tourangeau's motivation, with the express intent of avoiding an acquittal at the third trial. Colton II, 234 Conn. at 690-91, 663 A.2d at 342-43. In support of his Motion to Dismiss, Respondent offered to prove that the prosecutor had taken a series of actions in planning and executing this improper strategy, including the prosecutor's knowing refusal to investigate or take any cognizance whatsoever of a wealth of evidence demonstrating the false nature of Tourangeau's testimony, around which the prosecutor's strategy was centered. In particular, Defendant alleged that the prosecutor intentionally closed his eyes to thirteen separate items of evidence (including police reports from the very departments involved in Respondent's prosecution), any one of which, if credited, would have established that the State's portrayal to the jury of Tourangeau's alleged motivation in testifying was false. Id. at

691, 663 A.2d at 343. Further, Respondent alleged that subsequent to the third trial the prosecutor continued to ignore additional evidence of the third-trial perjury by this key witness, including publicly reported statements by Tourangeau's own children contradicting her testimony at the third trial. In sum, Respondent alleged and offered to prove in support of his motion that in order to avoid acquittal at the third trial the prosecutor had "suborned perjury." Id.[1]

When presented with Respondent's motion, the trial court ruled, as a procedural matter, that Respondent was not entitled to an evidentiary hearing on his double jeopardy claim because Respondent should have presented and obtained a state court factual finding on his claim of prosecutorial misconduct at an earlier stage of the prosecution. Based solely on what the Connecticut Supreme Court described as this "perceived procedural defect," id. at 698, 663 A.2d at 347, the trial court denied Respondent's attempt to elicit testimony in support of his claim of prosecutorial misconduct, and therefore, declined to reach the merits of Respondent's double jeopardy claim at all.[2] Id. Pending the outcome of an appeal of the court's procedural ruling on

---

[1] The Connecticut Supreme Court noted that under state law "[i]t is well established ... that a state's attorney has a duty, not solely to obtain convictions, but to ensure that all evidence tending to aid in the ascertaining of the truth be laid before the court, whether it be consistent with the contention of the prosecution that the accused is guilty. ... From this duty it necessarily follows that a state's attorney has the obligation to investigate fully the veracity of a witness' potential testimony in order to determine if that witness should testify." Id. at 691 n. 11, 663 A.2d at 343 n. 11 (quotations and citations omitted).

[2] Contrary to the suggestion in the Petitioner's brief ("Pet. Br."), p. 8, there was not a "two-day evidentiary hearing on Respondent's Motion." Respondent's motion to dismiss was heard by the trial court on the regular morning motion's calendar on October 27, 1993. At that time, there was approximately one hour of oral argument on legal issues relating to Respondent's double jeopardy claim and numerous other pretrial claims, and

Respondent's double jeopardy claim, the trial court held in abeyance any ruling on Respondent's remaining pretrial motions.

Respondent appealed the trial court's ruling to the Connecticut Supreme Court. The focus of the appeal was the trial court's refusal to consider Respondent's double jeopardy claim and to permit Respondent to make an evidentiary record in support of that claim. In another unanimous ruling, the Connecticut Supreme Court held, as a matter of "first impression in Connecticut," Id. at 696, 663 A.2d at 346, that "[t]o the extent that [prosecutorial] misconduct has occurred off-the-record, a defendant must have an opportunity to make a record in some fashion."[3] Id. at 698, 663 A.2d at 347. Accordingly, the Court ruled that Respondent

> should have been allowed the opportunity to create a record of the alleged prosecutorial misconduct in an attempt to carry his burden to prove a double jeopardy violation on the basis of prosecutorial misconduct in his third trial. The case, therefore, must be remanded to the trial court to consider the defendant's motion to dismiss on the merits.

Id. at 700, 663 A.2d at 348.

It is from this decision -- which, without ruling on the merits of Respondent's

---

the marking of certain sealed exhibits. The matter was then continued until November 17, 1993, on which date there was another approximate hour of legal arguments and colloquy with the court, without any taking of evidence. As noted above, and in the Connecticut Supreme Court's August 1995 opinion, the trial court thereafter denied the motion to dismiss on procedural grounds without permitting the development of an evidentiary record or even reaching the merits of Respondent's double jeopardy claim. Id. at 698-700, 663 A.2d at 347-48.

[3] In addition, the Connecticut Supreme Court noted that "if a claim of prosecutorial misconduct is derived solely from the record, the defendant may waive the claim by his failure to raise it as a motion for mistrial." Id. at 699 n. 16, 663 A.2d at 347 n. 16.

claim, merely remands this case for development of an evidentiary hearing -- that the State of Connecticut now petitions this Court for issuance of a writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner's request that this Court rule on the merits of Respondent's double jeopardy claim is premature and inappropriate, for there has been no ruling on the merits of that claim below; nor has an evidentiary record even been made that would permit such a ruling. Rather, the Supreme Court of Connecticut has simply remanded the case for an evidentiary hearing on the merits of Respondent's claim on the grounds that, pursuant to Connecticut procedural law, Respondent's claim of off-the-record prosecutorial misconduct was properly raised in his Motion to Dismiss. For the following reasons, therefore, this Court should decline Petitioner's invitation to review this case at this time and should deny its Petition for Writ of Certiorari.

First, the Connecticut Supreme Court's ruling is nothing more than an interlocutory order of remand under which the state trial court has been instructed to conduct proceedings to create the factual record necessary to permit it, for the first time, to address the substantive merits of Respondent's double jeopardy claim. The Connecticut Supreme Court's ruling is, therefore, not a "final judgment" under 28 U.S.C. § 1257. Accordingly, this Court lacks jurisdiction to grant the Petition for Writ of Certiorari.

Second, the state court's decision to remand for an evidentiary hearing rests on independent and adequate state grounds and thus does not raise any issue on which this

Court can or should pass at this juncture. As the Connecticut Supreme Court recognized, a long line of decisions regarding Connecticut's procedural law holds that the proper -- indeed only -- method of raising off-the-record prosecutorial misconduct, as alleged by Respondent, is by way of a motion to dismiss. The Connecticut Supreme Court thus held that the trial court had erred in denying Respondent an evidentiary hearing on the sole grounds of a "perceived procedural defect" in the raising of Respondent's claim. As such, there is no question of federal law that this Court may review at this stage of the proceedings.

Third, the supposed split among the circuits that serves as the basis of the Petition does not exist and could not be resolved through consideration of the present case even if it did. This Court has repeatedly considered petitions that presented the identical supposed "conflict" that Petitioner asserts exists here; yet in each instance, this Court has denied certiorari. Moreover, with respect to a state court's decision to afford a defendant the opportunity for an evidentiary hearing on a double jeopardy claim -- the precise ruling from which Petitioner seeks certiorari -- the case law is uniform that such hearings are appropriate and often essential to the adjudication of such claims; at the very least, ordering such a hearing is well within the state court's discretion.

Finally, the Connecticut Supreme Court's decision is not an appropriate vehicle for addressing the concerns raised by the Petitioner because the trial court, relying on a "perceived procedural defect," never held an evidentiary hearing, never made any factual findings and never considered the merits of Respondent's double jeopardy claim. Because of these circumstances and the unique facts of this case, it would not be

appropriate for this Court to use this case to consider the far-reaching rule suggested by Petitioner.

I. THIS COURT LACKS JURISDICTION TO REVIEW THE REMAND RULING BELOW

This Court's jurisdiction to review decisions of the state courts is limited to "final judgments" only. 28 U.S.C. § 1257. Section 1257's finality requirement "serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973). It also ensures that there will be an opportunity in the trial court to develop a full factual record and to obtain rulings on the merits of disputed issues prior to adjudication on appeal. Hathorn v. Lovorn, 457 U.S. 255, 261-62 (1982). See also Jackson v. Fort Stanton Hosp., 964 F.2d 980, 988 (10th Cir. 1992).

Granting review of the state court's remand ruling in this case, as requested by Petitioner, would be inconsistent with each of these principles. Indeed, far from a case in which the state court has acted with finality, the entire thrust of the ruling appealed from is that an evidentiary hearing is necessary **before** any court can act with finality on the merits of the constitutional claim at issue. Thus, no state tribunal has yet ruled that the double jeopardy clause precludes Petitioner from proceeding with a fourth trial. To the contrary, the Connecticut Supreme Court emphasized that such a decision rests in

the first instance with the trial court based upon the evidence that will be adduced at the yet-to-be-held evidentiary hearing on Respondent's Motion to Dismiss. Colton II, 234 Conn. at 698-700, 703, 663 A.2d at 346-49; id. at 700, 663 A.2d at 348 (the case "must be remanded to the trial court to consider the defendant's motion to dismiss on the merits.").

The ruling from which Petitioner seeks review is, thus, nothing more than an interlocutory order of remand under which the state trial court has been instructed to conduct proceedings to create the factual record that is necessary to permit the state court, **for the first time**, to address the substantive merits of Respondent's double jeopardy claim. Until that happens, there is nothing for this Court to review. Given that, as the Connecticut Supreme Court pointed out, "the defendant's burden is a heavy one," id. at 699, 663 A.2d at 347, it is entirely possible that following the completion of the proceedings on the merits of Respondent's motion, the trial court may rule in Petitioner's favor. Such a ruling would leave the pending prosecution undisturbed and render the State's request for this Court's involvement completely unnecessary. See, e.g., United States v. Wallach ("Wallach II"), 979 F.2d 912 (2d Cir. 1992), cert. denied, 113 S. Ct. 2414 (1993). In the alternative, if the trial court were to rule in favor of Respondent and dismiss the prosecution on double jeopardy grounds, Petitioner would then have the opportunity to seek appellate review of that ruling in the Connecticut Supreme Court and ultimately in this Court -- a review that would then have the benefit of a full factual record (which has yet to be developed) and a substantive trial court ruling (which has yet to be issued). Any review by this Court at this point, therefore, is entirely premature.

California v. Rooney, 483 U.S. 307, 313-14 (1987).

Nor does this case even remotely qualify under any of the four categories set forth in Cox Broadcasting v. Cohn Corp., 420 U.S. 469 (1975), as establishing sufficient finality on a federal question despite the pendency of further state proceedings on unrelated matters. This clearly is not a case in which the state court decision on a federal question leaves "nothing more to be decided." Id. at 479 & n. 8. To the contrary, the Connecticut Supreme Court's ruling has left **everything** to be decided in the future. There has been no ruling on Respondent's constitutional claims; the only issue that has been decided is Respondent's entitlement to make an evidentiary record regarding his claims. Cf. San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 633 (1981); Mills v. Alabama, 384 U.S. 214 (1966); Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69 (1946).

This is also not a case in which the federal issue, "finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings." Cox Broadcasting, 420 U.S. at 483. As set forth above, Respondent's double jeopardy claim was not decided by any court, and the result of the proceedings on remand may well render any action by this Court completely unnecessary. Thus, "the outcome of the future state proceedings" may well obviate the need for this Court to intervene in this case and will, at a minimum, have a significant impact on the disposition of Respondent's constitutional claim if this Court were to decide to review this case following the proceedings on remand.[4] See infra at 27-30. Cf. Radio Station

---

[4] Further, interlocutory review in this Court creates the risk of piecemeal federal review. The subsequent state proceedings may generate additional federal questions, thereby interfering with the ability to consider together related federal questions arising out of a

WOW, Inc. v. Johnson, 326 U.S. 120 (1945). Moreover, as discussed above, this is not a case in which Petitioner would be precluded from presenting its federal claim for review in the future. See Florida v. Meyers, 466 U.S. 380, 381 n.* (1984); North Dakota State Bd. of Pharmacy vs. Snyder's Drug Stores, 414 U.S. 156 (1973); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

Finally, this is not a case in which awaiting the normal process of final judgment would somehow in itself "seriously erode federal policy." Cox Broadcasting, 420 U.S. at 483. If anything, the policy underlying the double jeopardy protection would be eroded by acceding to Petitioner's request for an interlocutory, advisory ruling at this stage, with the resultant further delay in the adjudication of the merits of Respondent's double jeopardy claim. In reviewing double jeopardy claims, this Court has repeatedly emphasized the importance of the development of an adequate evidentiary record; a record that the Petitioner would prevent Respondent from making. See, e.g., Oregon v. Kennedy, 456 U.S. 667, 681-82 (1982); Arizona v. Washington, 434 U.S. 497, 514 & n. 34, 516-17 (1978)("[s]ince the record provides sufficient justification for the state-court ruling, the failure to explain that ruling more completely does not render it constitutionally defective."); United States v. Dinitz, 424 U.S. 600, 611 & n. 14 (1976)("the record does not show that the judge's action was motivated by bad faith or undertaken to harass or

---

single case. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477 n. 6 (1975); Catlin v. United States, 324 U.S. 229, 233-34 (1945). For example, in this case, Respondent filed eight pretrial motions in connection with the State's unprecedented attempt to retry him a fourth time, including the Motion to Dismiss. The trial court held in abeyance any action on Respondent's remaining pretrial motions, pending the outcome of Respondent's appeal.

prejudice the respondent."); Illinois v. Somerville, 410 U.S. 458, 462-63 (1973)("this Court, ..., has scrutinized the action [of the trial court] to determine whether, in the context of that particular trial, the declaration of a mistrial was dictated by 'manifest necessity' or the 'ends of public justice.'"); Gori v. United States, 367 U.S. 364, 368 (1961)("[w]here, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment.") The double jeopardy clause is designed to protect the interest of Respondent, not Petitioner, Oregon v. Kennedy, 456 U.S. at 671-72. That interest is seriously undermined by Petitioner's misguided attempt to have this Court unnecessarily and prematurely intervene in pending state pretrial proceedings, even before an evidentiary record has been created and Respondent's claim has been adjudicated on the merits.

In similar circumstances, this Court has held on numerous occasions that a decision by a state court to remand a case for a hearing on the merits lacks the finality necessary to support review by this Court. For example, in California v. Rooney, 483 U.S. 307 (1987), this Court dismissed an improvidently granted writ of certiorari for lack of jurisdiction, noting that the Supreme Court "reviews judgments, not statements in opinions." Id. at 311 (quotations and citations omitted). In Rooney, the California Superior Court had granted defendant's motion to quash a warrant, ruling that the use of evidence obtained from a warrantless search of a communal trash bin to support a

search warrant for defendant's apartment violated his Fourth Amendment rights. The Superior Court also ruled that other supporting evidence for the warrant was insufficient to establish probable cause and dismissed the charges against defendant. Id. at 314-15. Although it agreed with the trial court that the evidence found in the trash bin could not be used to support the warrant, the California Court of Appeals reversed the trial court's ruling because it concluded that there was sufficient other evidence to establish probable cause for the warrant to search the apartment. The Court of Appeals ruling, therefore, permitted the prosecution to proceed. Id. The California Supreme Court denied both petitioner's and respondent's petitions for review, and the State then sought review before this Court, arguing that the California courts had erred in concluding that the search of the trash bin was unconstitutional. This Court dismissed the writ of certiorari in words that aptly apply to the Connecticut Supreme Court's decision here:

> [e]ven if everything the prosecution fears comes to bear, the State will still have the opportunity to appeal such an order, and this Court will have the chance to review it, with the knowledge that we are reviewing a state-court *judgment* on the issue, and that the State Supreme Court has passed upon or declined review in a case squarely presenting the issue. As it stands, we have no way of knowing what the California Supreme Court's position on the issue of trash searches currently is. . . . Giving the California Supreme Court an opportunity to consider the issue in a case that properly raises it is a compelling reason for us to dismiss this petition. Under these circumstances, our review of the trash-search issue, which has never been the subject of an actual judgment, would be most premature.

Id. at 313-14 (footnotes omitted).

Similarly, in O'Dell v. Espinoza, 456 U.S. 430 (1982), this Court dismissed an appeal from a remand decision by the state's highest court because such a decision was not a final judgment.

Under 28 U.S.C. § 1257, this Court has jurisdiction to review only "[f]inal

> judgments or decrees rendered by the highest court of a State in which a decision could be had." Because the Colorado Supreme Court remanded this case for trial, its decision is not final "as an effective determination of the litigation." Market Street R. Co. v. Railroad Comm'n of Cal., 324 U.S. 548, 551 (1945). . . . We therefore dismiss for want of jurisdiction.

Id.; see Minnick v. California Dep't of Corrections, 452 U.S. 105, 127 (1981)("we conclude that we should not address the constitutional issues until the proceedings in the trial court are finally concluded and the state appellate courts have completed their review of the trial court record.")

Petitioner provides no authority whatsoever for its novel attempt to have this Court inject itself into pending pretrial proceedings prior to any ruling on the merits, let alone a final judgment, by a state court. In fact, Petitioner completely ignores the fundamental jurisdictional infirmities in its Petition, assuming, without discussion, that this Court has jurisdiction to review the Connecticut Supreme Court's interlocutory ruling. Pet. Br., pp. 2, 11. Cf. Durley v. Mayo, 351 U.S. 277, 285 (1956)(petitioner bears the burden of establishing this court's jurisdiction). For the reasons stated, this Court has no such jurisdiction, and therefore, it should deny the Petition for Writ of Certiorari for lack of jurisdiction.

II. THE CONNECTICUT SUPREME COURT'S DECISION RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS

The Connecticut Supreme Court never reached the merits of Respondent's double jeopardy claim because the trial court "denied the defendant's motion to dismiss on the basis of a perceived procedural defect." Colton II, 234 Conn. at 698, 663 A.2d at 347. Relying on state procedure, the Connecticut Supreme Court reversed the trial court's

finding of a "procedural defect"; given the unique factual allegations of off-the-record prosecutorial misconduct that Respondent makes in this case, the Court held that "a claim of prosecutorial misconduct at a previous time would have been futile." Id. Thus, the Connecticut Supreme Court held, in accordance with long-established state procedure, that Respondent was entitled to an evidentiary hearing on his Motion to Dismiss and remanded the case to the trial court for such a hearing. The fact that the substance of the claim to which the state court procedures will be applied involves a federal constitutional question does nothing to change the fact that the ruling below is a matter of state court procedure. Accordingly, this Court lacks jurisdiction to review that ruling. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 291-95 (1982); Wilson v. Loew's, Inc., 355 U.S. 597, 598 (1958); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Fox Film Corp. v. Muller, 296 U.S. 207, 210-11 (1935); Enterprise Irrigation Dist. v. Farmers Mutual Canal Co., 243 U.S. 157, 164-66 (1917).

Under Connecticut's rules of procedure, a defendant in a criminal case is required to raise legal challenges to his prosecution, including double jeopardy defenses, by means of a motion to dismiss. Conn. Practice Book § 815(6). Such motions are required to be filed in writing prior to trial, Practice Book § 811-812, and **must** be raised by such a motion and "only" such a motion. Id. § 808. The Connecticut Supreme Court has required strict adherence to these rules, and has a long history of denying legal claims, including federal constitutional claims, when a party has failed to adhere to the strictures of these state procedures. See, e.g., State v. Pickles, 28 Conn. App. 283, 286, 610 A.2d 716, 719 (1992); State v. Booker, 28 Conn. App. 34, 37, 611 A.2d 878, 882 (1992), cert.

denied, 113 S. Ct. 1271 (1993); State v. Vincent, 194 Conn. 198, 479 A.2d 237, 240-42 (1984); State v. Baez, 194 Conn. 612, 484 A.2d 236, 237-38 (1984); State v. Orsini, 187 Conn. 264, 445 A.2d 887, 891-92, cert. denied, 459 U.S. 861 (1982).

In a long line of recent cases, the Connecticut Supreme Court has also prescribed a strict rule concerning the proper state procedure for raising claims arising from conduct in prior criminal proceedings. For example, in a watershed ruling in 1985, the Connecticut Supreme Court held that as a matter of state procedure, claims of ineffective assistance of counsel arising during an underlying trial may not be raised on direct appeal from that trial. State v. Rivera, 196 Conn. 567, 494 A.2d 570 (1985). See also, State v. Tirado, 194 Conn. 89, 92-93, 478 A.2d 606, 608 (1984); State v. Chairamonte, 189 Conn. 61, 64-65, 454 A.2d 272, 274 (1983); State v. Just, 185 Conn. 339, 370-71, 441 A.2d 98, 114 (1981); State v. Barber, 173 Conn. 153, 154-55, 376 A.2d 1108 (1977). Rather, the Court held that such claims must be raised in a collateral proceeding, in order to permit the full development of an evidentiary record essential to orderly appellate review.[5] Rivera, 196 Conn. at 570-71, 494 A.2d at 571-72. See also, Just, 185 Conn. at 371, 441 A.2d at 114; Barber, 173 Conn. at 154-55, 376 A.2d at 1108. In numerous subsequent cases reiterating this requirement of state procedural law, the

---

[5] More recently, the Connecticut Supreme Court overruled a lower court habeas corpus ruling, which had precluded the plaintiff from making an evidentiary record. Reversing the Appellate Court's ruling that the Connecticut Supreme Court's prior decision on direct appeal of the underlying conviction barred consideration of a related claim on habeas, the Supreme Court held that under state procedure "the petitioner ... [was] entitled to an opportunity to present further evidence to support his claim that inadequate assistance of counsel deprived him of a fair trial." Mercer v. Commissioner of Corrections, 230 Conn. 88, 92, 644 A.2d 340, 342 (1994).

Connecticut Supreme Court has emphasized the need for collateral evidentiary hearings to develop a record of "matters which do not appear of record at the trial." State v. Mason, 186 Conn. 574, 579, 442 A.2d 1335, 1338 (1982) (quoting State v. Barber, 173 Conn. 153, 155, 376 A.2d 1108 (1977)). See e.g., State v. Williamson, 206 Conn. 685, 706, 539 A.2d 561, 571 (1988); State v. Leecan, 198 Conn. 517, 541-42, 504 A.2d 480, 493, cert. denied, 476 U.S. 1184 (1986).

In reversing the trial court's refusal to provide Respondent an evidentiary hearing based upon a "perceived procedural defect," the Connecticut Supreme Court below expressly relied upon this long line of decisions regarding Connecticut procedure. Indeed, the Court explicitly analogized its rulings on the proper procedure for raising ineffective assistance of counsel claims to the claims made by Respondent in this case and applied the reasoning of those decisions to Respondent's request for an evidentiary hearing on his Motion to Dismiss:

> The reasoning behind the procedure for bringing a claim of ineffective assistance of counsel in a petition for a writ of habeas corpus is equally applicable to the issue before us. . . . *Absent the evidentiary hearing available in the collateral action, review in this court of the ineffective assistance claim is at best difficult and sometimes impossible.* The evidentiary hearing provides the trial court with the evidence which is often necessary to evaluate the competency of the defense and the harmfulness of any incompetency.' . . .
>
> In the present case, during the evidentiary hearing on his motion to dismiss on the ground of double jeopardy, the defendant attempted to present evidence of prosecutorial misconduct that allegedly had occurred both on and off-the-record. The trial court, however, did not consider the factual allegations of prosecutorial misconduct. Rather, it denied the defendant's motion to dismiss on the basis of a perceived procedural defect. The trial court concluded, as a matter of law, that the defendant could not, in a collateral proceeding, bring a claim of double jeopardy because of alleged prosecutorial misconduct without having first raised a claim of prosecutorial misconduct at some previous time. In the absence of a

> record of the alleged misconduct that had occurred off-the-record, however, a claim of prosecutorial misconduct at a previous time would have been futile. To the extent that misconduct allegedly has occurred off-the-record, a defendant must have an opportunity to make a record in some fashion.

Colton II, 234 Conn. at 697-98, 663 A.2d at 346-47 (quotations and citations omitted). Further underscoring the procedural nature of the Connecticut Supreme Court's ruling, the Court also added that a defendant "may waive" a claim of prosecutorial misconduct "derived solely from the record by his failure to raise it in a motion for mistrial." Id. at 699 n. 16, 663 A.2d at 347 n. 16. In short, while the Connecticut Supreme Court also discussed and relied upon federal decisions such as Wallach II, supra, its ruling requiring an evidentiary hearing on Respondent's claim was one of state procedural law, resting on a long line of state precedent, and not raising any federal issue that this Court can or should address at this juncture.

The rule prohibiting this Court from reviewing state court decisions on issues of state law was articulated more than a century ago in Murdock v. City of Memphis, 87 U.S. (20 Wall) 590 (1875). Under the doctrine of "independent and adequate state grounds," if the state court judgment rests on state law sufficiently broad to support the judgment, this Court lacks jurisdiction altogether to review the judgment, even where (unlike here) the state court has also rendered an erroneous decision on the merits of a competing federal claim. This rule, which stems from obvious concerns of federalism, is especially compelling in the area of state procedural law. As Justice Frankfurther noted

in Brown v. Gerdes:

> (T)he States are as free from control by Congress in establishing state systems for litigation as is Congress from state control in establishing a federal system for litigation...
> ...(W)hether the particular litigation is to be tried by jury and if so, how the jury is to be composed . . . whether security is to be furnished and of what nature - in sum, whether a state court can take jurisdiction and what the incidents of the litigation should be - all these are matters wholly within the control of the State creating the court and without the power of Congress.

321 U.S. 178, 188-90 (1944) (Frankfurter, J., concurring). See Monger v. Florida, 405 U.S. 958 (1972)(court denied certiorari because judgment of the state court rested upon an adequate state procedural ground). See also, Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945)("[w]e are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977)("[i]f the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted"); Ridgway v. Ridgway, 454 U.S. 46, 54 (1981)("[w]e forthwith acknowledge, of course, that this Court's only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." (quotations and citation omitted)).

The states have a multiplicity of rules and procedures for the conduct of litigation, including the proper time for raising claims in their various court systems. The "incidents of the litigation," Gerdes, 321 U.S. at 190, under which each state adjudicates claims -- including federal constitutional claims -- in their civil and criminal proceedings is a matter of individual state choice. As long as these procedures comport with minimum

due process requirements, there is no need or basis for this Court to become involved in second-guessing the state courts' judgment in this respect. Aladdin's Castle, 455 U.S. at 294-95 ("[i]f Texas law provides independent support for the Court of Appeals' judgment, there is no need for decision of the federal issue.")

Perhaps the most telling indication of why intervention in this case at this time is inappropriate is the parade of horrors Petitioner sets forth at the conclusion of its brief, proclaiming the "grave implication for the administration of justice" if the Connecticut Supreme Court's procedural decision is allowed to stand. Pet. Br., pp. 27-29. Totally apart from the fact that the scenario imagined by Petitioner has no basis in reality, the notion that this Court needs to assist the Connecticut Supreme Court in deciding how best to manage its state court docket is curious, to say the least. The Connecticut Supreme Court went to some lengths in the opinion below to limit the reach of its ruling to the exceptional facts presented by the "rare" case before it. Colton II, 234 Conn. at 698-700, 663 A.2d at 347-48. Indeed, the Court emphasized that "[a]nalogous circumstances should arise infrequently" and that contrary to Petitioner's supposition, the Court's ruling "should not invite a plethora of comparable claims." Id. Petitioner gives no indication of how this Court would be in a better position to assess the consequences of this procedural ruling for the Connecticut court system, or the wisdom of the state's highest court in adopting it. Most importantly, the "policy" that Petitioner would have this Court reconsider is precisely that -- a matter of individual state procedural law and policy, which does not provide grounds for this Court's review.

III. THERE IS NO "SPLIT" AMONG THE CIRCUITS THAT REQUIRES THIS COURT'S REVIEW

After first ignoring the fundamental -- and dispositive-- jurisdictional impediments to granting certiorari at this juncture, Petitioner proceeds to create a supposed "split" among the circuit court of appeals, which it would have this Court resolve in this "rare" case. As set forth below, there is no "split" on the precise issue decided by the Connecticut Supreme Court, and even if one existed, this case does not offer an appropriate vehicle for resolving such a conflict.

At base, the Petition is founded on Petitioner's claim that the decisions of the United States Court of Appeals for the Seventh Circuit in Beringer v. Sheahan, 934 F.2d 110 (7th Cir. 1991), cert. denied, 502 U.S. 1006 (1991) and the United States Court of Appeals for the Second Circuit in United States v. Wallach, 979 F.2d 912 (2d Cir.), cert. denied, 113 S. Ct. 2414 (1992) create a "split" between the circuits. However, examination of those decisions shows that this so-called conflict is more perceived than real.

Wallach involved a direct appeal by a defendant in a federal criminal prosecution who raised a double jeopardy claim involving **off-the-record** prosecutorial misconduct. Wallach, 979 F.2d at 914. The Second Circuit held that while the defendant was permitted to raise his off-the-record double jeopardy claim, the double jeopardy clause did not bar retrial in that case. Id. at 916-18. Beringer arose in the context of a habeas corpus petition by a defendant in a completed state criminal prosecution. Beringer, 934 F.2d at 110-11. By contrast to Wallach, the double jeopardy claim raised by petitioner in Beringer focused exclusively on **on-the-record** misconduct by the prosecutor at the earlier

trial. Id. at 111. Indeed, in Beringer, there was no claim, let alone prior finding by a state court, that anything outside the existing transcript at the prior trial would have had any bearing on the double jeopardy claim. Nor was there any ruling (as there was by the Connecticut Supreme Court in this case) that the habeas petitioner was unable to have litigated his claim in a direct appeal under applicable state procedure. Id. at 110-11. Further, unlike Wallach, the Seventh Circuit in Beringer never reached the merits of defendant's double jeopardy claim. Id. at 111-12. Thus, far from establishing a well-developed and clear conflict between the circuits warranting the exercise of this Court's discretionary jurisdiction, Wallach and Beringer are different rulings involving different procedural and factual circumstances.

Moreover, contrary to Petitioner's claim, in the past 13 years since this Court's decision in Oregon v. Kennedy, there has not been a "profusion of double jeopardy claims" that mandates this Court's intervention. Pet. Br., p. 30. Indeed, given the number of retrials each year in the federal and state systems, the number of double jeopardy decisions since Oregon v. Kennedy is, if anything, surprisingly few. Those decisions show that each circuit court and state court has conscientiously applied the double jeopardy doctrine developed by this Court to the fact-specific cases presented to it. See, e.g., United States v. Pavloyianis, 996 F.2d 1467 (2d Cir. 1993); United States v. Curtis, 683 F.2d 769, 776 (3rd Cir.), cert. denied, 459 U.S. 1018 (1982); Robinson v. Wade, 686 F.2d 298, 303 (5th Cir. 1982); Sizemore v. Fletcher, 921 F.2d 667, 669-72 (6th Cir. 1990); Beringer v. Sheahan, 934 F.2d 110, 111 (7th Cir.), cert. denied, 112 S. Ct. 641 (1991); Jacob v. Clarke, 52 F.3d 178, 180 (8th Cir.), cert. denied, 116 S. Ct. 323 (1995);

Greyson v. Kellam, 937 F.2d 1409, 1415 (9th Cir. 1991); Fugitt v. Lemacks, 833 F.2d 251, 252 (11th Cir. 1987); People v. Harbold, 635 N.E.2d 900, 902 (Ill. App. 1994), cert. denied, 115 S. Ct. 1254 (1995); Coreas v. United States, 585 A.2d 1376, 1379-80 (D.C. App.), cert. denied, 502 U.S. 855 (1991); Commonwealth v. Green, 536 A.2d 436, 437 (Pa. Super. 1988); State v. Sage, 510 N.E.2d 343, 353-54 (Ohio 1987). Had the conflict between the circuits that Petitioner imagines existed, this Court presumably would have granted a petition for writ of certiorari in either Beringer or Wallach. However, this Court denied petitions for a writ of certiorari in each case and has repeatedly denied certiorari in a number of other cases cited by Petitioner as evidencing this supposed "conflict." See e.g., United States v. Coleman, 862 F.2d 455 (3d Cir. 1988), cert. denied, 490 U.S. 1070 (1989); United States v. Dante, 739 F.2d 547 (11th Cir.), cert. denied, 469 U.S. 1036 (1984); United States v. Curtis, 683 F.2d 769 (3d Cir.), cert. denied, 459 U.S. 1018 (1982); United States v. Singleterry, 683 F.2d 122 (5th Cir.), cert. denied, 459 U.S. 1021 (1982); United States v. Rios, 637 F.2d 728, 729 (10th Cir. 1980), cert. denied, 452 U.S. 918 (1981); People v. Ramirez, 500 N.E.2d 14 (Ill. 1986), cert. denied, 481 U.S. 1053 (1987); Coreas v. United States, 585 A.2d 1376 (D.C.), cert. denied, 112 S. Ct. 167 (1991). Clearly, therefore, this Court has not in the past considered there to exist a split among the courts that warrants this Court's review. Nothing in the Connecticut Supreme Court's decision requires a change in this Court's approach.

Finally, the ruling of the Connecticut Supreme Court that Respondent was entitled to an evidentiary hearing on his claim is fully in accordance with Oregon v. Kennedy and the decisions of other courts. In fact, this Court's decision in Oregon v.

Kennedy underscores the importance of holding an evidentiary hearing on a defendant's double jeopardy claim. In that case, Justice Powell's concurring opinion (and essential fifth vote) was based entirely on the record that had been developed below, including the testimony of the trial prosecutor at the hearing on defendant's double jeopardy motion and the trial court's findings regarding that testimony. 456 U.S. at 681. Justice Powell "emphasized[ed]" that his crucial fifth vote turned on the evidentiary record relating to intent, noting that in considering such claims a court "should rely primarily upon the objective facts and circumstances of the particular case" and that Oregon v. Kennedy "would have been a close case for me if there had been substantial factual evidence of intent beyond the [on-record] question itself." Id. at 680.

Similarly, the decisions that Petitioner claims conflict with the Connecticut Supreme Court's decision in this case all involved evidentiary hearings. For example, the Seventh Circuit in Beringer v. Sheahan, 934 F.2d 110, 111 (7th Cir. 1991) premised its decision on the "full hearing" conducted by the district court in denying the defendant's petition for a writ of habeas corpus on double jeopardy grounds. Id. See also United States ex rel. Beringer v. O'Grady, 737 F. Supp. 478 (N.D. Ill. 1990). Similarly, in United States v. Curtis, 683 F.2d 769, 776 (3rd Cir. 1982), the Third Circuit held that the prosecutorial misconduct was insufficient to bring the case within the narrow exception of Oregon v. Kennedy, but did so only after a review of the record and the findings of the district court following an evidentiary hearing. Likewise, the Fifth, Sixth, Eighth, Ninth and Eleventh Circuits reviewed defendants' double jeopardy claims based on prosecutorial misconduct only **after** an evidentiary hearing, like the one requested by

Respondent, had been held.[6]

There can be no doubt that, in the guise of a procedural rule, Petitioner is seeking the rejection of the underlying substantive claim that Respondent has raised in this case, without affording Respondent an opportunity to provide this Court -- or any court -- with the evidence of the off-the-record facts that Respondent asserts support his claim. In effect, the rule proposed by Petitioner is that a defendant would never be entitled to an evidentiary hearing on a claim of off-the-record prosecutorial misconduct surrounding a prior trial. However, there is nothing in the language or the rationale of any of the cases discussed above to suggest that any one of these courts had adopted the

---

[6] See, e.g., Robinson v. Wade, 686 F.2d 298, 303 (5th Cir. 1982)("On due consideration, the magistrate concluded that Robinson's reprosecution would not offend the double jeopardy clause and accordingly recommended that his petition be dismissed and the stay of the impending criminal prosecution be dissolved."); Sizemore v. Fletcher, 921 F.2d 667, 669-72 (6th Cir. 1990)(after reviewing the evidence, court held that it would not find that habeas petitioner's second trial was barred by double jeopardy); Jacob v. Clarke, 52 F.3d 178, 180 (8th Cir. 1995)(only after an evidentiary hearing was relief denied); Greyson v. Kellam, 937 F.2d 1409, 1415 (9th Cir. 1991)(court relied on the state court's finding, after a hearing, that the prosecution did not intend to goad defendant into moving for a mistrial during his third trial); Fugitt v. Lemacks, 833 F.2d 251, 252 (11th Cir. 1987)(holding was based on the evidentiary hearing held by the state trial judge). See also, People v. Harbold, 635 N.E.2d 900, 902 (Ill. App. 1994), cert. denied, 115 S. Ct. 1254 (1995)(the trial court denied defendant's double jeopardy motion after an evidentiary hearing); Coreas v. United States, 585 A.2d 1376, 1379-80 (D.C. App.), cert. denied, 502 U.S. 855 (1991)(although no evidentiary hearing was requested, the trial court reviewed each instance of prosecutorial misconduct and made explicit findings that the government did not intentionally provoke a mistrial or the reversal which resulted instead); Commonwealth v. Green, 536 A.2d 436, 437 (Pa. Super. 1988)(after conducting a hearing, the trial court denied appellant's motion based on the fact that appellant could not prove intentional misconduct on the part of the Commonwealth); State v. Sage, 510 N.E.2d 343, 353-54 (Ohio 1987)(because evidence did not show that prosecutorial misconduct was calculated to goad defense into seeking mistrial, double jeopardy principles did not bar retrial).

curious (and illogical) rule that an evidentiary hearing need be provided only when all of the evidence already appears on the record. To the contrary, the cases above illustrate the importance of the subsequent evidentiary hearing itself to develop the "facts and circumstances" (Oregon v. Kennedy, 456 U.S. at 675) on which the determination of a double jeopardy claim must turn. This is particularly true where, as here, there has been a substantial showing made that such facts and circumstances exist and when the facts and circumstances in question relate primarily to conduct not yet of record. Colton II, 234 Conn. at 696-97, 663 A.2d at 346. Once that evidentiary record has been developed, and only then, will the state courts, and if necessary this Court, be in a position to address the merits of Respondent's double jeopardy claim.

IV. THE DECISION BELOW IS NOT AN APPROPRIATE VEHICLE FOR ADDRESSING THE CONCERNS RAISED BY THE PETITIONER

This Court is presently at a disadvantage in even considering the concerns raised by the Petitioner because the trial court, relying on a "perceived procedural defect," never held an evidentiary hearing, never made any factual findings, and never reached the merits of Respondent's double jeopardy claim. Because of the interlocutory setting of the case and its unique facts, this case is not an appropriate vehicle for addressing these issues raised by the Petitioner.

Having heard and decided two fully briefed appeals in the past three years, the Connecticut Supreme Court is intimately familiar with this protracted prosecution. That Court minced no words regarding the serious nature of the alleged misconduct at issue here, noting that the "gravamen" of the claim is that the prosecutor, fully aware of the

extensive record indicating that a hoax was being perpetrated, intentionally closed his eyes to all of it and may have deliberately "suborned perjury" in order to avoid an acquittal, in violation of fundamental and "well-established" ethical and legal obligations. Colton II, 234 Conn. at 691 & n. 11, 663 A.2d at 343 & n. 11. The allegations of prosecutorial misconduct on which Respondent bases his claim represent an outrageous attempt intentionally to subvert the central tenets of the double jeopardy clause. Under this set of allegations, the Connecticut Supreme Court properly recognized that it could not and should not decide Respondent's double jeopardy claim on the merits without giving the trial court the opportunity to develop an adequate record. Indeed, the only holding that the Court was able to make from the present record in this case, or lack thereof, was that it was essential to remand this case for a hearing on Respondent's claim.

If Respondent's allegations are proven at the now-mandated evidentiary hearing, this is a case -- hopefully, "rare" to the point of being unique, see id. at 699, 663 A.2d at 347 -- that violates even the most stolid view of the double jeopardy guarantee.[7] It is a

---

[7] As the decision of the Connecticut Supreme Court makes clear, this Court is not presented with a typical criminal case that has been remanded for a new trial. To the contrary, this, as the Court noted, is a "rare case":

> We do not mean to suggest that every reversal of a criminal case on appeal in which the charges are reinstituted would thereafter give rise to a valid claim of double jeopardy on the basis of alleged prosecutorial misconduct.[] Indeed, we anticipate that this claim would arise only rarely. This is such a case. Here, the defendant's conviction was reversed and a new trial ordered because the court had inhibited the scope of the defendant's cross-examination of a state witness, without whose testimony the state conceded there would be insufficient evidence to satisfy even probable cause, and the defendant claimed prosecutorial misconduct relating to the testimony of that witness, the alleged evidence of which was acquired, at least in part,

case in which the motivation and truthfulness of a single witness was concededly the only issue determining the outcome of a trial in a case in which there had been two prior hung juries, id. at 684-85, 663 A.2d at 340-41; in which law enforcement's own doubts concerning its witness's veracity caused it to conduct three successive lie detector tests, each of which the witness failed to pass; in which a bevy of police reports and other documents generated by agencies under the control of Petitioner itself disclosed a continual pattern of drug addiction, manipulation of the criminal justice system and fake accusations against others by the State's star witness, id. at 690-91, 663 A.2d at 343; and in which the prosecutor deliberately avoided pursuing even a single one of these troubling leads, choosing instead affirmatively to promote a picture to the jury of its key witness that was flatly contradicted by the facts known to the prosecutor.[8]

> after the verdict and possibly after the appeal. Analogous circumstances should arise infrequently and should not invite a plethora of comparable claims. [n.16] Indeed, if a claim of prosecutorial misconduct is derived solely from the record, the defendant may waive the claim by his failure to raise it as a motion for mistrial.

Colton II, 234 Conn. at 698-99, 663 A.2d at 347 (n. 15 omitted)(emphasis added). The Connecticut Supreme Court's decision turned upon the unique facts of this case and, given those very unique facts, it is difficult to imagine that such a case will impact persons other than the present litigants.

[8] As the opinion below noted, quoting directly from Respondent's Motion to Dismiss in the trial court:

> [f]ully aware of this record, and the substantial indication of prevarication, manipulation and perjury it established, the prosecutor intentionally closed his eyes to all of it, deliberately avoided obvious avenues of investigation readily accessible to the State, and failed to pursue or present evidence that could have damaged his case or aided the defendant, in violation of ethical and constitutional obligations of which the prosecutor was similarly fully aware.

Colton II, 234 Conn. at 691, 663 A.2d at 344 (quotations and footnote omitted). These

After stonewalling Respondent's efforts below to make a record of the pertinent facts, Petitioner now asserts that these serious allegations of prosecutorial misconduct rest on "pure speculation." Pet. Br., p. 26. This curious technique of litigating -- or, rather, avoiding litigating -- what is clearly a fact-intensive issue, by first refusing to engage in the standard procedure for developing evidence and then presuming authoritatively to assert in this Petition that no evidence exists to support Respondent's claims, conveniently enables Petitioner to avoid the facts alleged in support of Respondent's Motion to Dismiss. At a minimum, if this Court is to consider the far-reaching rule suggested by Petitioner, the Court should do so on the basis of a fully developed factual record and not, as Petitioner would have this Court do, in the abstract. Moreover, if the Court wishes to consider the issues raised by Petitioner, it should do so in a case that presents facts that are likely to arise with some frequency in the future, not in a "rare" case such as this that raises exceptional facts. For all the reasons set forth above, this case is simply not an appropriate vehicle for exploring the legal issue that Petitioner presents. Accordingly, the Petition should be denied.

---

allegations, if proven, establish that the prosecutorial misconduct occurring in this case was undertaken with the "intent ... to subvert the protections afforded by the Double Jeopardy Clause." Oregon v. Kennedy, 456 U.S. at 676.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Mark R. Kravitz
Counsel of Record
Bonnie L. Patten
Wiggin & Dana
One Century Tower
New Haven, CT 06508
(203) 498-4400

Kenneth Rosenthal
Brenner, Saltzman & Wallman
271 Whitney Avenue
New Haven, CT 06511
(203) 772-2600

Counsel for Respondent

Dated January 8, 1996.

L:\DATA\CLI\3\00010703\1\BRIEF006.BLP

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF CONNECTICUT	:	
V.	:	NO. 95-726
MURRAY COLTON	:	

CERTIFICATE OF SERVICE

I, Mark R. Kravitz, a member of the Bar of this Court, hereby certify that on this 8th day of January 1996, copies of the documents described below, all relating to the above-entitled action, were mailed, via the United States Postal Service, by first-class mail, postage prepaid, along with a copy of this certificate of service, to counsel for the Petitioner-State of Connecticut, as follows:

John M. Bailey
Chief State's Attorney
Office of the Chief State's Attorney
340 Quinnipiac Street
P.O. Box 5000
Wallingford, CT 06492
(203) 265-2373

Jack W. Fischer
Assistant State's Attorney
Office of the Chief State's Attorney
340 Quinnipiac Street
P.O. Box 5000
Wallingford, CT 06492
(203) 265-2373

I further certify that the following documents were mailed as described above: motion for leave to proceed on certiorari in forma pauperis; affidavit of petitioner in support of motion for leave to proceed in forma pauperis; and respondent's brief in opposition to the certiorari.

I further certify that all parties required to be served have been served.

BY: _____

Mark R. Kravitz
Counsel of Record
Bonnie L. Patten
Wiggin & Dana
One Century Tower
New Haven, CT 06508
(203) 498-4400

Kenneth Rosenthal
Brenner, Saltzman & Wallman
271 Whitney Ave.
New Haven, CT 06511
(203) 772-2600

Counsel for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF CONNECTICUT	:	
V.	:	NO. 95-726
MURRAY COLTON	:	

CERTIFICATE OF SERVICE OF BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I, Mark R. Kravitz, a member of the bar of this court, hereby certify, pursuant to Rule 29 of the Rules of the Supreme Court, that on this ??? day of January 1996, an original plus ten copies of a brief in opposition to the petition for writ of certiorari, and a motion for leave to proceed on certiorari in forma pauperis and affidavit in support of same; all were mailed, via first class mail, postage prepaid, by depositing same at the United States Postal Service, in New Haven, Connecticut.

I further certify that a copy of this certificate of service has been mailed, on this 8th day of January 1996, by first class mail, postage prepaid, to counsel for the Petitioner-State of Connecticut, as follows:

John M. Bailey
Chief State's Attorney
Office of the Chief State's Attorney
340 Quinnipiac Street
P.O. Box 5000
Wallingford, CT 06492
(203) 265-2373

Jack W. Fischer
Assistant State's Attorney
Office of the Chief State's Attorney
340 Quinnipiac Street
P.O. Box 5000
Wallingford, CT 06492
(203) 265-2373

I further certify that all parties required to be served have been served.

BY: _____

Mark R. Kravitz
Counsel of Record
Bonnie L. Patten
Wiggin & Dana
One Century Tower
New Haven, CT 06508
(203) 498-4400

Kenneth Rosenthal
Brenner, Saltzman & Wallman
271 Whitney Ave.
New Haven, CT 06511
(203) 772-2600

Counsel for Respondent

L:\10703\1\MOT0001_.BLP